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Staff Report

Applicant: Seabridge Gold (NWT) Inc.	
Location: Courageous Lake, NT	File Number: MV2019C0025 MV2019L2-0011 MV2019L2-0012
Date Prepared: January 10, 2020	Date of Board Meeting: January 16, 2020
Subject: Mackenzie Valley Resource Management Act – Section 152 – Applicability to Seabridge Gold	

1. Purpose

The purpose of this Report is to present to the Mackenzie Valley Land and Water Board (MVLWB/the Board):

- a) A Request for Ruling from Seabridge Gold (NWT) Inc. (Seabridge) on the applicability of Section 152 of the *Mackenzie Valley Resource Management Act* (MVRMA) to its Courageous Lake Lease 76D/3-6-6; and
- b) A Legal Memorandum prepared by Board Counsel that summarizes the issues, evidence presented by interveners and proponent, and an analysis of the legislation, evidence and previous relevant Board decisions. (attached under confidential cover)

2. Background

- September 18, 2019 – Applications received;
- September 27, 2019 – Applications deemed complete and distributed for review;
- October 16, 2019 – Request submitted by the Government of the Northwest Territories to extend the comment and recommendation submission date;
- October 17, 2019 – Board staff granted the extension to the comment deadline and notification to the distribution list that the date changed;
- October 24, 2019 – Comments and recommendations submitted by reviewers;
- November 7, 2019 – Further Study Required request issued the Board, transboundary determination made by the Board and responses due from Seabridge;
- November 7, 2019 – Government of the Northwest Territories (GNWT) security estimate provided to the Board;
- November 13, 2019 – Seabridge responded to the GNWT security estimate;
- November 29, 2019 – Directive issued for a “mini proceeding” relating to section 152;
- December 5, 2019 – Additional evidence provided by Seabridge;
- December 5, 2019 – Parties to notify the Board if they wish to see the Lease documents;

- December 11, 2019 – Evidence submitted by the GNWT relating to the applicability of section 152 of the MVRMA;
- December 16, 2019 – Evidence submitted by the Chamber of Mines relating to the applicability of section 152 of the MVRMA;
- December 18, 2019 – Evidence submitted by the Tłıchǫ Government relating to the applicability of section 152 of the MVRMA;
- December 19, 2019 – Final argument submitted by the GNWT;
- December 23, 2019 – Final argument submitted by Seabridge; and
- January 16, 2020 – Presented to the Board for decision.

3. Discussion

On September 18, 2019, Seabridge submitted applications for the following activities:

- Mineral exploration including drilling;
- Storage of fuels;
- Winter road construction, maintenance and use; and
- Quarrying.

The use of three or more drills at one time may result in daily water usage that exceeds the 100m³/day allowed under the regulations without a water licence. As such, the activities also require two type B water licences; one to authorize the use of water and the deposit of waste on Territorial Lands and one to authorize the use of water and the deposit of waste on Federal Lands.

On October 24, 2019, comments and recommendations were received from seven reviewers:

- Fisheries and Oceans Canada;
- Government of the Northwest Territories – Lands
- Government of the Northwest Territories – Prince of Wales Northern Heritage Centre;
- INAC – NWT Inspector
- INAC – Yellowknife
- Wek'eezhii Renewable Resources Board; and
- Yellowknives Dene First Nation.

On November 7, 2019, the Board determined that the applications are transboundary as per the MVMRA as well as the Board Governance Policy. Also, the Board invoked paragraph 22(2)(b) of the Mackenzie Valley Land Use Regulations (MVLUR) to allow for further studies and investigations. Paragraph 22(2)(b) was invoked as a result of the extension being granted to the GNWT which in turn extended the response date of Seabridge to day 42 of the legislated timeline as outlined in the MVRMA. Responses were submitted by Seabridge on November 7, 2019.

On November 7, 2019, the NWT submitted their security estimate to accompany the comments made on October 24, 2019. Seabridge provided their response on November 13, 2019. (attached)

On November 29, 2019, a Directive under the Board's Rules of Procedure was sent to Seabridge as well as the distribution list in response to a letter provided by GNWT-Lands dated July 14, 2005; a letter from Indian and Northern Affairs Canada (INAC) advising that the Matthews Lake Lease at that time was subject to the MVLUR and that any activity may require a land use permit. It was determined that the question of the applicability of section 152 needed to be resolved before the scope/application of a

permit for the current applications could be determined. A Work Plan was distributed, outlining the proceeding as well as the submission due dates. (attached)

By December 5, 2019, Seabridge was asked to provide any additional evidence, including a copy of the Lease 76D/3-6-6. It was noted that the Lease would be held under confidential cover and not placed on the Board's online registry. Seabridge responded indicating that they would not be submitting any additional evidence and that they would provide further submission following receipt of other parties' evidence and/or argument. (attached)

By December 11, 2019, evidence was to be submitted by parties relating to the applicability of section 152 of the MVRMA. Evidence was received from the GNWT which included records from the initial surface lease 76D/3-6-2 lease by Indian and Northern Affairs Canada (INAC) to Bathurst Inlet Developments (1984) Ltd. in 1994 and subsequent surface leases 76D/3-6-3 and 76D/3-6-4 also lease by INAC to Bathurst Inlet Developments in 1995, 2005, and 2010, and the current surface lease 76D/3-6-6 lease by the GNWT to Seabridge in 2015. (attached) (Leases attached under confidential cover)

On December 16, 2019, the NWT and Nunavut Chamber of Mines submitted correspondence indicating that many mining companies rely upon historical surface leases in the NWT to conduct their operations. Those operators would not expect to require a new land use permit to continue operations on a surface lease, given the past 20 years of conduct by the territorial government, federal government and the Board. They are not aware of any historical surface leases over unmodified operations which have been required to obtain a new land use permit in those circumstances. If a different approach were adopted, it could adversely impact a significant number of mining companies operating in NWT and create a material disincentive to new companies considering investing in the territory. They strongly recommend that all such leases be grandfathered from the MVRMA land use permitting requirements, and should be regulated pursuant to the lease requirements, as has been the case in NWT for the past 20 years. (attached)

On December 18, 2019, the Tłı̄chq̄ Government submitted a letter indicating that section 152 has treaty implications that were analyzed by the Wek'eezhi Land and Water Board in its recent "Dominion" decision. (attached) The Dominion decision described section 152 as a "transitional provision that addresses the continuation of rights and interests in land that existed before the MVRMA came into force." The WLWB provided several grounds, including a plain reading of the MVRMA, for holding that section 152 does not preclude the Board from imposing new conditions on pre-existing rights. Most significant is the inevitable conclusion that section 152 must be interpreted to avoid conflict with the Board's jurisdiction to issue land use permits, which is a power granted by section 22.3.14 of the Tłı̄chq̄ Agreement and thus guaranteed by section 35 of the *Constitution Act, 1982*. The Tłı̄chq̄ Government letter stated, "As noted in the Dominion decision, in the event of a conflict between the Tłı̄chq̄ Agreement and the MVRMA, the Tłı̄chq̄ Agreement expressly prevails. In future decisions, the Board can only conclude, as the WLWB did, that section 152 of the MVRMA cannot prevent the Board from carrying out the permitting functions required by the Tłı̄chq̄ Agreement or another treaty. (attached)

On December 19, 2019, the GNWT submitted their final argument acknowledging there have been inconsistencies in the administration of surface lease 76D/3-6-6 since the enactment of the MVRMA and associated regulations. In 2005, what was then Aboriginal Affairs and Northern Development Canada (AANDC) issued a new surface lease that replaced the surface lease that was in place prior to the enactment of the MVRMA. In issuing the new lease, AANDC explicitly advised the previous leasee, that

the surface lease was subject to the MVRMA and associated regulations. Despite the evidence, the Lease has been administered as though it is not subject to the MVRMA and associated regulations. The GNWT has noted that they have not found evidence of correspondence between itself and AANDC stating that there was a change in the approach that was noted in the 2005 letter. The GNWT indicated that if the Government of Canada properly exercised any authority it has in 2005 not to perpetuate an exemption from the application of the MVRMA then the GNWT has no ability to alter this. (attached)

On December 23, 2019, Seabridge submitted their final arguments putting forward their opinion of the inconsistency in the treatment of the Lease, grandfathering does not conflict with the Tłı̨ch̨ Agreement and that if the Board concludes that section 152 does apply and a land use permit is to be required, Seabridge wishes to exclude the Lease lands from its current application and have a new land use permit issued for the Matthews Lake camp. (attached)

Site History

On April 20, 2001, an application (attached) was submitted by Bathurst Inlet Development Ltd. to cover the camp at the Tundra Mine airstrip, fuel storage, winter road as well as to support the camp (Treeline Lodge) on Matthews Lake. During the application review, Board staff requested additional information relating to various items in the application as well as information relating to the Treeline Lodge (attached). The specific question that was asked was the number of person-days the camp will be used for.

On November 5, 2001, Bathurst Inlet Development Ltd. stated that:

Treeline Lodge, on Matthews Lake, is a developed tourism camp for eco-tourism and operated primarily during the summer and fall periods. The lodge operations generate greater than 400 person days per year. The lodge also provides logistical support to exploration companies that may be working in the area. (attached).

The application was deemed complete and posted for review. Comments were submitted by the following organizations:

- Environment Canada;
- Department of Fisheries and Oceans;
- Stanton Regional Health Board;
- Lutsel'Ke Dene Band; and
- Department of Indian and Northern Affairs Canada.

In the comments submitted by the Department of Fisheries and Oceans (attached), they summarize the application as follows:

- The 4 ha main camp site and a 0.5 ha potential satellite camp at the air strip;
- The winter road access from the Tibbitt to Contwoyto Winter road to the main camp; and
- The 28 km of support roads.

On December 19, 2001, a staff report was presented to the Board indicating that the Treeline Lodge was included in the application as the person days triggered the requirement of a Land Use Permit (attached).

On December 24, 2001, the Permit was issued to Bathurst Inlet Development Ltd. with a commencement date of May 20, 2002 and an expiration date of May 19, 2007 (attached).

When Permit MV2001X0030 expired, Bathurst Inlet Development Ltd, applied for two storage authorizations, each authorization being a year in duration.

On July 1, 2009, Bathurst Inlet Development Ltd, applied for a new Permit to support the existing main lodge, ice roads, fuel storage and a small camp located at the airstrip to accommodate extra staff, with a small satellite camp being used when small groups for mining or tourists do not warrant to use of the main lodge (attached). In the application Bathurst Inlet Development Ltd. included materials which reference the inclusion of the main lodge in the land use permit.

On August 3, 2010, Bathurst Inlet Development Ltd. withdrew their application as a result of the sale of the camp to Seabridge Gold (attached).

No Land Use Permit has been applied for since the expiry of the 2001 authorization.

4. Conclusion

The legal opinion provided by Board Counsel provides the analysis of the WLWB decision as well as the evidence provided in this Request for Ruling, and recommendations for the Board to consider (attached in confidence).

5. Recommendation

Based on the information presented above, the evidence on the record, and the confidential memo provided by counsel, Board staff recommend the Board:

- a) **Make a motion to rule that Section 152 of the *Mackenzie Valley Resource Management Act* does not apply to the Seabridge Gold (NWT) Inc. Lease 76/D3-6-6** and that the Board can issue a land use permit for the existing camp if deemed to be required.
- b) Accept to issue its Reasons for Decision at a later date, following approval by the Chair.

Board staff are seeking direction from the Board on the next steps and propose the following:

- a) The Board advise Seabridge and GNWT-Lands of the decision (draft decision letter attached) and that it is a GNWT responsibility to determine if a Land Use Permit is required for the Leased area.
- b) Board staff to work with Legal Counsel to develop draft Reasons for Decision.
- c) That Board staff resume the regulatory process for authorizations MV2019C0025, MV2019L2-0011, and MV2019L8-0012.

6. Attachments

- Confidential Legal memo from Board Counsel
- [MVLWB – Directive – Section 152 – MVRMA – November 29, 2019](#)
- [Seabridge Response to MVLWB Directive – December 5, 2019](#)
- [GNWT – Evidence - Letter – Applicability of Section 152 – MVRMA – December 11, 2019](#)
- GNWT Evidence - Surface Lease 76D_3-6-6 - CONFIDENTIAL
- [Chamber of Mines – Applicability of Section 152 – MVRMA – December 16, 2019](#)

- [Tłjchq Government – Applicability of Section 152 – MVRMA – December 18, 2019](#)
- [Wek’eezhii Land and Water Board Decision – Dominion Diamond Mines – Misery Underground – Request for Ruling – May 9, 2019](#)
- [GNWT – Applicability of Section 152 - Final Argument – December 19, 2019](#)
- [Seabridge – Applicability of Section 152 – Final Argument – December 23, 2019](#)
- [MV2001X0030 – Application submitted by Bathurst Inlet Development Ltd.](#)
- [MV2001X0030 – Incomplete letter sent by MVLWB Board staff](#)
- [MV2001X0030 – Response to incomplete letter](#)
- [MV2001X0030 – Comments on Application submitted by the Department of Fisheries and Oceans](#)
- [MV2001X0030 – Staff Report – December 19, 2001](#)
- [MV2001X0030 – Issuance Letter from MVLWB – December 24, 2001](#)
- [MV2001X0030 – Approved Land Use Permit](#)
- [MV2009X0028 – Application submitted by Bathurst Inlet Development Ltd.](#)
- [MV2009X0028 – Application withdrawn from Bathurst Inlet Development Ltd.](#)
- Draft Decision Letter

Respectfully submitted,



Tyree Mullaney
Regulatory Specialist